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No. 96-320

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,

v.

MICHAEL BUCKLEY,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Daniel J. Popeo
Richard A. Samp
Counsel of Record
Penelope Kilburn Shapiro
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Date: September 30, 1996

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Rule 36.3 of the rules of this Court, the Washington Legal Foundation respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petitioner. The petitioner has consented to the filing of this brief, but the respondent has refused to provide consent.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 100,000 members and supporters nationwide. WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses. In particular,

WLF has devoted substantial resources to curbing abusive litigation practices, excessive punitive damage awards, excessive attorneys' fees, and unwarranted expansion of tort liability by publishing monographs and similar educational materials on these subjects, and by filing *amicus curiae* briefs in appropriate cases. *See, e.g., Consolidated Rail Corp. v. Gottshall,* 114 S. Ct. 2396 (1994); *Burlington Northern Railroad Co. v. Ford,* 112 S.Ct. 2184 (1992); *TXO Production Corp. v. Alliance Resources Corp.,* 113 S. Ct. 2711 (1992).

WLF believes that the decision below in this case is a radical departure from the common law of tort liability and the law of liability under the Federal Employers' Liability Act (FELA). If left intact, this decision will impose significant costs on all businesses, both within the FELA context and without. These increased costs will ultimately be borne by consumers, workers, and society as a whole. WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

For the foregoing reasons, movant WLF respectfully requests that it be allowed to participate in this case and

file the annexed brief *amicus curiae* in support of petitioner.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Counsel of Record
Penelope Kilburn Shapiro
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

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QUESTION PRESENTED

May mere exposure to a potentially harmful substance, in the absence of any physical injury or even symptom, be a sufficient basis for recovery under the Federal Employers' Liability Act?

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BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

The decision below improperly permitted a plaintiff, who manifests no physical effect whatsoever from exposure to asbestos, to assert a claim under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, for negligent infliction of emotional distress based on his general, non-

severe anxiety regarding his future health. This ruling is directly contrary to the holding of this Court in *Consolidated Rail Corp. v. Gottshall,* 114 S.Ct. 2396 (1994), is contrary to the overwhelming weight of common law authority in the area, and represents a radical expansion of tort liability.

In *Gottshall*, this Court recognized only a single, narrow exception to the general requirement that emotional distress must be accompanied by an underlying physical injury to be compensable. The "zone of danger" exception articulated by the Court in *Gottshall*, simply does not apply in the context of the instant case and was misapplied by the Second Circuit. Instead, this case much more closely parallels the claim asserted in the companion case, *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90 (3d Cir. 1990), which was rejected outright by this Court in *Gottshall*. There, this Court held that an employee's anticipatory, wholly speculative fear of physical injury cannot support a cognizable claim under FELA.

This limitation on liability for emotional distress is supported by sound policy concerns. Potential liability for mental distress claims of the sort asserted by petitioner would be far too vast, and their incidence much too unpredictable. Actionable tort claims would skyrocket and employers would have little or no ability to defend themselves against the flood of litigation. In the particular context of asbestos litigation, allowing claims based solely on emotional distress may exhaust the available resources of asbestos defendants and severely prejudice those who actually develop debilitating asbestos-related disease.

In short, the underlying decision is a significant and troubling one that is directly contrary to existing authority and

will have far-reaching effects if allowed to stand. For these reasons and the reasons set forth below, the Washington Legal Foundation (WLF) respectfully urges this Court to grant certiorari.

ARGUMENT

I. THE MENTAL DISTRESS COMPLAINED OF IS NOT COMPENSABLE UNDER THIS COURT'S FELA JURISPRUDENCE

The mental distress asserted by Buckley -- general, non-severe worry regarding potential future illness because of his exposure to asbestos while on the job -- is not compensable under the Federal Employers' Liability Act or the applicable common law. This Court's decision in *Consolidated Rail Corp. v. Gottshall,* 114 S. Ct. 2396 (1994), and numerous decisions of lower courts dealing with asbestos exposure, make clear that an employee may not recover for fear of future illness unless he has some physical injury because of the exposure. Simply put, general "free-floating" anxiety regarding a possible future injury, unconnected with any current physical symptoms of such an injury, is not compensable under FELA or the common law from which FELA gleans its liability standards.

In *Gottshall*, this Court considered two consolidated claims for negligent infliction of emotional distress; one arising from an alleged on-going program of stressful and dangerous working conditions that led to an employee's mental breakdown, and the other arising out of a particular harrowing incident in which a worker collapsed and died causing severe fright and long-term trauma to a co-worker

who witnessed the death. The underlying decisions of the Third Circuit had found both claims to be compensable because the mental distress was "genuine and serious" and was a foreseeable outcome of the employers' negligent actions. *Gottshall,* 114 S.Ct. at 2408.

This Court rejected the lower court's analysis as unworkable and unsupported by the common law. While this Court found for the first time that a claim of negligent infliction of emotional distress could be asserted under FELA, it recognized the real dangers inherent in this cause of action. Claims of negligent infliction of emotional distress must be strictly limited for two important reasons -- the potential for fraudulent and trivial claims and the prospect of "unpredictable and nearly infinite liability for defendants." *Id.* Focusing on the latter consideration, this Court emphasized that the "genuineness" test articulated by the Third Circuit would provide employers with "no standard against which to regulate their conduct," 114 S. Ct. at 2409, and would subject employers to liability essentially any time an employee had an adverse emotional response to an employer's negligent action. Because the only check on liability would be the severity of the employee's reaction, courts "would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts." *Id.* This approach would lead to unacceptable *ad hoc* decision-making and would cast the net of employer liability far too broadly.[1]

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[1] Thus, this Court has specifically rejected, at least in the FELA context, the standard arguably suggested by a small minority of common law decisions that recovery for negligent infliction of emotional

(continued...)

This Court then reversed the Third Circuit and established a far narrower test for determining when a plaintiff may pursue a claim under FELA *solely* for emotional distress without any accompanying physical injury. The Court adopted the "zone of danger" test, holding that the sole exception to the general rule that emotional harm is compensable only when linked to a physical injury is where the employee --although in fact unhurt physically -- was within the immediate vicinity of an accident or incident and was threatened with imminent physical injury. In other words, where a ceiling collapses due to negligence, it will be no defense to liability if the employee standing under it was able to leap to safety at the last moment and avoid physical injury. 114 S. Ct. at 2406, 2410.

In deciding to restrict valid claims for negligent infliction of emotional distress in this manner, this Court explicitly recognized that certain plaintiffs who suffered real and severe emotional damage would not be entitled to recover under the law. *Gottshall*, 114 S. Ct. at 2411. This Court reasoned that numerous important policy concerns, including "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability," argue against providing a cause of action for all plaintiffs who have suffered emotional harm due to their employers' negligent actions. *Id.*

Contrary to the Second Circuit's conclusion in the instant case, the zone of danger exception provides no basis for Mr. Buckley to recover here. Indeed, none of the traditional

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[1](...continued)
distress could be allowed based solely on establishing medical proof of the severity of the distress.

elements of the zone of danger test is present where a plaintiff is seeking to recover for the increased anxiety he feels because of exposure to a potentially dangerous agent, such as asbestos. There was no accident or singular traumatic event here. Mr. Buckley is not in any imminent danger of developing a physical disease or impairment; indeed, his general anxiety is the result of his inability to determine for as many as twenty to thirty years whether he has been harmed in any way by his exposure. Finally, Mr. Buckley does not allege that he suffered a severe fright that led to emotional injury. *See Gottshall,* 114 S. Ct at 2406, 2410-11 (discussing traditional elements of zone of danger test and citing cases).

Rather, Mr. Buckley's claim is more akin to the claim pursued by the companion plaintiff, Mr. Carlisle, which this Court dismissed outright in the *Gottshall* decision. Mr. Carlisle was a train dispatcher who alleged that the unsafe working conditions that Conrail imposed upon him, including requiring him to rely on outdated and unsafe equipment, demanding that he work long and arduous shifts, and subjecting him to the supervision of an alcoholic boss, caused him to suffer severe emotional distress. *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90, 92-93 (3d Cir. 1993); *see also Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 914 (3d Cir. 1994) (describing the cause of Mr. Carlisle's stress as the pressure "to achieve on-time performance" and "to ignore safety concerns that would slow the movement of trains"). In directing that judgment be entered against Mr. Carlisle, this Court reasoned that such a claim "plainly does not fall within the common law's conception of the zone of danger," and ruled that FELA does not provide any remedy for such work-related stress. *Gottshall,* 114 S. Ct. at 2411-12.

Mr. Buckley's claim is similar to that of Mr. Carlisle. Mr. Buckley claims that the unsafe working conditions created by Metro-North, i.e., the failure to protect him adequately against asbestos exposure, have caused him to fear that he may develop cancer or another physical impairment at some point in the future. The essence of Mr. Carlisle's claim is closely analogous. Mr. Carlisle claimed that unsafe working conditions made him fearful and overwrought. More specifically, the dangerous working conditions created by his employer caused him to be afraid that he would someday hurt himself in performing his job duties or that he would cause injury to passengers or freight at some future time, and the stress of this fear ultimately led to a mental breakdown. In rejecting Mr. Carlisle's claim, this Court concluded that this sort of generalized worry about possible future harms, no matter how severe, is not compensable under FELA.

The logic of the *Gottshall* decision regarding Mr. Carlisle's claim dooms Mr. Buckley's claim and demonstrates the fallacy of the Second Circuit's decision here. Certainly, if a negligently unsafe aspect of Mr. Carlisle's job had *actually* resulted in physical injury to him, he would have been entitled to assert a claim against Conrail for his physical injuries and any accompanying emotional distress. Prior to any such injury, however, his anticipatory concern regarding safety issues, no matter what emotional trauma it led to, was not a compensable injury under FELA or the common law. Similarly, if Mr. Buckley, in fact, suffers a physical impairment as a result of his exposure to asbestos, he will be allowed to pursue a claim for that physical injury and any accompanying emotional distress. Until that time, however, he does not have a claim under FELA.

II. THE SPECTER OF UNLIMITED AND UNPREDICTABLE EMPLOYER LIABILITY ARGUES STRONGLY AGAINST THE SECOND CIRCUIT'S DECISION

The Court made plain in *Gottshall* that concern regarding the specter of unpredictable and unlimited liability for employers was paramount. 114 S. Ct. at 2408-09, 2411. That concern is equally, if not more, applicable in the context of the instant case. If left intact, the Second Circuit's decision will significantly increase the liability of railroad employers in any number of contexts.[2]

In the arena of asbestos litigation alone, the effect of the Second Circuit's decision will be dramatic. As this Court certainly is aware, asbestos litigation is a huge and potentially crippling problem for the United States court system, and, indeed, for the United States economy. Tens of thousands of personal injury and wrongful death lawsuits seeking recovery for asbestos-related disease have been filed in state and federal courts over the past twenty-five years.[3] While it is not possible to determine precisely the number of workers and

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[2] The increased liability will not likely be limited to railroad employers. Just as FELA is informed by the common law, *Gottshall*, 114 S. Ct. at 2403, the common law is influenced by this Court's pronouncements of tort law under FELA.

[3] The size of the pending asbestos caseload remains a matter of great concern. As United States District Judge Charles Weiner, who presides over the federal multidistrict asbestos personal injury litigation, recently noted, the total number of asbestos cases that have been filed in the multidistrict proceeding is 58,478, and only approximately 20,000 of these have been resolved to date. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, CA No.2 MDL 875, 1996 WL 239863, at *5 (E.D. Pa. May 2, 1996).

individuals that have been exposed to asbestos, experts have estimated that more than 21 million workers were significantly exposed to asbestos in the 40 years prior to 1980. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1337 (5th Cir. 1985), *citing*, I. Selikoff, *Disability Compensation for Asbestos-Associated Disease in the United States*, Environmental Sciences Laboratory, Mt. Sinai School of Medicine of the City University of New York (1981).[4] Certainly, several million of these workers are likely covered by FELA.

If the Second Circuit's decision is allowed to stand, there would be, for all intents and purposes, no limit to the class of plaintiffs that would be entitled to sue for negligent infliction of emotional distress. Literally any worker that had contact with asbestos in the work place, and we know that there are millions of such individuals, would be entitled to sue for any increased worry and concern they might have as a result of that exposure. An employer's liability would be nearly limitless and entirely unpredictable. As the Third Circuit concluded,

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly

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[4] For this reason, the only limiting principle that the Second Circuit announced here -- that the contact with asbestos be "massive" and not "incidental," (A-23), is no limit at all as a practical matter. In addition, this subjective, undefined standard would subject juries and judges to just the type of *ad hoc*, line-drawing decision-making that the Court denounced in *Gottshall*. 114 S. Ct. at 2409.

> speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.

Schweizer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).

Beyond the asbestos context, employers could potentially be liable for any negligently-created working condition that increased an employee's anxiety about his future health. For example, an employee could assert a claim for negligent infliction of emotional distress based on high-stress conditions that increased his worry about contracting an ulcer or suffering a stroke or heart attack; based on the presence of second-hand smoke in the work place that increased his concern about developing lung cancer; or based on the presence of electromagnetic fields from power lines that increased his anxiety about getting brain cancer.

This is precisely the sort of unlimited, unpredictable, and unprincipled liability that this Court denounced in *Gottshall*.

III. ALLOWING RECOVERY SOLELY FOR ANXIETY MAY EXHAUST AVAILABLE RESOURCES AND ULTIMATELY HARM ASBESTOS PLAINTIFFS

Allowing asbestos plaintiffs, such as Mr. Buckley, to recover for their "fear of cancer" alone, may end up undercompensating them if they actually do develop an asbestos-related impairment.

FELA has traditionally been a single recovery statute, meaning that a plaintiff may sue only one time for injuries arising from a particular wrongful act of the employer. *See Mellon v. Goodyear*, 277 U.S. 335, 344 (1928); *Flynn v. New York. N. H. & H. R. Co.*, 283 U.S. 53, 56 (1931). The Second Circuit here explicitly ruled that Mr. Buckley can recover only for his current emotional harm and not for the risk of contracting an asbestos-related disease at some future date. (A-18, n.1) If Mr. Buckley ultimately develops a physical impairment, it is not at all clear that he will be able to pursue a second claim against Metro-North for his physical injury. Thus, if his claim is allowed to go forward now, Mr. Buckley could potentially end up considerably *undercompensated* for injuries caused by his asbestos exposure.

Moreover, even if FELA plaintiffs were allowed to pursue a second claim for physical injuries, the Second Circuit's decision may reduce their ability to recover. As this Court is undoubtedly aware, neither the nation's judicial resources nor the resources of asbestos defendants are infinite. As the bankruptcy filings of numerous asbestos manufacturers attest, there is a limited amount of money available to compensate those individuals injured by asbestos, and that pool of funds may be exhausted at some point. For this reason, experts have counseled that claims should be addressed in the order of their severity. *See, e.g.*, Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv.J.L. & Pub. Pol'y 541 (1992); *In re Asbestos Prods. Liab. Litig.*, 1996 WL 239863 at *5 (dismissing claims of asymptomatic plaintiffs because they "waste this Court's time. Other victims suffer while the Court is clogged with such filings.").

Here, the Second Circuit has not even limited legitimate asbestos claimants to those who suffer from some physical symptom of asbestos exposure. If the doors of the courthouse are thrown open wide enough to admit those that do not yet have *any* physical effect of their exposure, there may be little or no monies remaining for those that become diseased several years down the road.

IV. THE DECISION BELOW WOULD MAKE EMPLOYERS' LIABILITY BROADER AND MORE UNPREDICTABLE, THUS MAKING IT MORE DIFFICULT TO INSURE

The decision below would expand employers' liability for emotional distress far beyond the boundaries of the zone of danger exception. The increased breadth and unpredictable nature of this liability will increase the cost and restrict the availability of liability insurance.

Workplace mental distress is far more difficult for an employer to predict and guard against than physical injury. Physical injuries, which have a clear physical cause and effect, do not depend primarily on the individual characteristics of the plaintiff.[5] Emotional injuries, on the other hand, depend entirely on such characteristics. *See* Marc A. Antonetti, *Labor Law: Workers' Compensation Statutes and the Recovery of Emotional Distress Damages In the Absence of Physical Injury*, 1990 Ann. Surv. Am. Law 671, 672. "Where a workman loses a finger because of an errant

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[5] For this reason, the zone of danger exception, which is premised on the occurrence of an accident or other singular physical event, is a much more limited area of liability than that created by the decision below.

piece of machinery, the ascertainable injury and the work-related cause are direct and simple. However, emotional distress may have multiple causes, some work-related, others not so related." *Archer v. Indus. Comm'n*, 619 P.2d 27 (Ariz. Ct. App. 1980). Clearly, a worker's "personal subjective vulnerability" determines his or her reaction to job conditions, including job stress or exposure to toxic agents. Sara J. Sersland, *Mental Disability Caused By Mental Stress Cases*, 33 Drake L. Rev. 751, 757 (1983-84). Moreover, while asbestos-related diseases follow an etiology that allows their rate to be predicted with some statistical certainty, and historical claims rates can be used to predict the rate of industrial accidents, emotional distress claims have no such characteristic.

It is simply not possible to estimate with any degree of certainty the number of persons that may have an adverse emotional response to exposure to asbestos or any other unsafe working condition. The unpredictability of emotional distress, and therefore of liability for emotional distress under a negligence standard, will have an important economic consequence: it will reduce the availability and increase the cost of liability or workers' compensation insurance. Insurance requires that risk be statistically predictable over the long term. *See* Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* 136-37 (1988); Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 Ohio St. L.J. 399, 404-09 (1987). Insurers do not have the means to make the predictions about the incidence and severity of emotional distress claims that are necessary to price an insurance product efficiently. Employers will therefore find liability insurance more difficult to find and

more costly to purchase.[6] These increased costs will be passed on, in whole or in part, to workers, in the form of lower wages, and/or consumers, in the form of higher prices.

V. THE DECISION BELOW WOULD LEAD TO TREMENDOUS DIFFICULTIES IN THE APPLICATION OF THE STATUTE OF LIMITATIONS

Finally, the decision of the Second Circuit to allow Mr. Buckley's speculative claim to proceed not only represents bad policy, it will also lead to practical problems in the prosecution of such claims. Specifically, the relevant statute of limitations issues would be exceedingly difficult to adjudicate.

The application of a statute of limitations depends on a determination as to when the claim being asserted arose. Virtually every court that has considered asbestos claims in this context has determined that no claim arises "until an objectively verifiable functional impairment develops." *In re Hawaii Federal Asbestos Cases,* 734 F. Supp. 1563, 1570 (D.

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[6] As stated by the dissenting judge in *Vallery v. Southern Baptist Hospital*, 630 So.2d 861, 870 (La. App. 1993):

> Where insurance companies cannot quantify a certain risk, the cost of insurance can be out of all proportion to the risk. [Allowing individual to recover for fear of AIDS without an physical injury] would add another costly layer of inordinate expense to the treatment of AIDS without doing anything to advance the treatment of AIDS. From a public policy perspective, this would represent a very poor allocation of health care dollars at a time when money for AIDS is insufficient in particular, and the cost of health care in general is in crisis.

Hawaii 1990); *accord Simmons v. Pacor, Inc. et. al.*, 674 A.2d 232 (Pa. 1996); *Locke v. Johns-Manville Corp.*, 275 S.E.2d 900 (Va. 1981). This is consistent with the precedent of this Court. *See Urie v. Thompson,* 337 U.S. 163, 170 (1949) (worker exposed to silica dust sustains injury and cause of action accrues only as of time that adverse effects first manifest themselves). Thus, the development of a physical injury is the triggering event, and the applicable statute of limitations begins to run from that time.[7]

With a claim solely for emotional distress, entirely unconnected to any physical event, injury, or even symptom, there is no objectively verifiable triggering event to begin the running of the statute of limitations. A plaintiff could arbitrarily set the date on which his emotional distress developed. This date could be manipulated to achieve the largest recovery from an employer and/or its insurance companies. (For example, the date could be set just prior to or after a sale of the employing company, whichever was perceived to be most advantageous, or at a time when the employer's insurance coverage was greatest.) Because of the long incubation period of asbestos-related disease, there could be a twenty or thirty-year period over which a plaintiff could at any time decide that he could no longer cope with the fear of cancer and elect to pursue a claim for negligent infliction of emotional distress. Obviously, this significantly undermines the policy underlying statutes of limitations; i.e., that at some point in time the law should no longer recognize a claim.

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[7] Similarly, under the narrow "zone of danger" exception, the triggering event for the statute of limitations is a known physical accident of incident.

On the other hand, employers would likely argue that the statute of limitations for an emotional distress claim should begin to run at the time that the plaintiff "knew" all the facts about his exposure and the health risks of asbestos. Again, this is an unknown, virtually unverifiable date. Employers would gather evidence seeking to establish this event on the most convenient date for the employer. Insurance companies that provided coverage to the employer over different time periods would certainly weigh in to argue for a particular start of the statute of limitations period.

In short, simply establishing the date on which the "claim" arose would be a highly fact-specific threshold inquiry that could require its own mini-trial to resolve. *See In re Hawaii,* 734 F. Supp. at 1570 (refusing to recognize a claim for fear of cancer in part because "[a] regime of recovery for emotional distress not anchored to an underlying compensable harm presents boundless headaches in adjudicating statute of limitations problems."). Such serious practical obstacles to adjudicating claims properly argue strongly against expanding tort liability in this manner.

In sum, there are considerable "costs" -- whether in the form of increased crowding of the courts, the potential for the exhaustion of available resources to compensate asbestos plaintiffs, of the direct costs associated with buying insurance coverage and paying claims -- that will result from the expansion of FELA liability in the manner directed by the Second Circuit. These costs will be borne by society as a whole to benefit a class of plaintiffs, the overwhelming majority of whom *will never contract any form of asbestos-related disease.* This is too great a price to pay and one which the law does not support.

CONCLUSION

For the foregoing reasons, WLF respectfully requests that this Court grant certiorari and reverse the decision of the Second Circuit.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Counsel of Record
Penelope Kilburn Shapiro
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302